

**STATE OF WISCONSIN
Department of Commerce**

In the Matter of the PECFA Appeal of-

Ray Price
GLS Industries, Inc.
7200 North Highway 63
Rochester, Minnesota 55906-8979

PECFA Claim: #53039-9607-58
Hearing: #98-186

Final Decision

Preliminary Recitals

Pursuant to a Petition for Hearing dated October 27, 1998 and filed November 6, 1998, under § 101.02(6)(e) Wis. Stats., and § Comm/ILHR 47.53 Wis. Adm. Code, to review a decision of the Wisconsin Department of Commerce (Department), a hearing was commenced on December 14, 1999, at Madison, Wisconsin. A Proposed Hearing Officer Decision was issued on May 19, 2000 and the parties were provided a period of twenty (20) days to file objections.

The Issue for determination is:

Whether the Department's Decision of October 19, 1998 was correct with regard to its denial of the Appellant's claim of \$8509.71 for reimbursement of costs incurred following the removal of a petroleum underground storage tank.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Ray Price
GLS Industries, Inc.
7200 North Highway 63
Rochester, Minnesota 55906-8979

Wisconsin Department of Commerce
PECFA Bureau
201 W. Washington Avenue
P.O. Box 7838
Madison, Wisconsin 53707-7838

By: Kristiane Randal, Esq.

Assistant Legal Counsel
Wisconsin Department of Commerce
201 W. Washington Avenue, Room 322A
P.O. Box 7838
Madison, Wisconsin 53707-7838

The authority to issue a Final Decision in this matter has been delegated to the undersigned by the Secretary of the Department pursuant to § 560.02(3) Wis. Stats.

The matter now being ready for Final Decision I hereby issue the following:

FINDINGS OF FACT

The Findings of Fact in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of Final Decision.

DISCUSSION

The Discussion in the Proposed Hearing Officer Decision cited above is hereby adopted for purposes of Final Decision.

FINAL DECISION

The Proposed Hearing Officer Decision cited above is hereby adopted as the Final Decision of the Department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under § 227.48 Wis. Stats. If you believe this decision is based on a mistake in the facts or law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Office of Legal Counsel, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this Final Decision as "PARTIES IN INTEREST".

Your request must explain what mistake you believe the hearing examiner made and why it is important or you must describe your new evidence and tell why you did not have it available at the hearing in this

matter. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request for a new hearing will be denied.

Your request for a new hearing must be received by the Department's Office of Legal Counsel no later than twenty (20) days after the mailing date of this Final Decision as indicated below. Late requests cannot be reviewed or granted. The process for asking for a new hearing is set out in § 227.49 Wis. Stats.

Petition For Judicial Review

Petitions for judicial review must be filed not more than thirty (30) days after the mailing of this Final Decision as indicated below (or thirty (30) days after the denial of a request for a hearing, if you ask for one). The petition for judicial review must be served on the Secretary, Office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" or each party's attorney of record. The process for judicial review is described in § 227.53 Wis. Stats.

Dated: 8/16/00

Martha Kerner
Executive Assistant
Wisconsin Department of Commerce
201 West Washington Avenue
P.O. Box 7970
Madison, Wisconsin 53707-7970

Copies to:

Above identified "PARTIES IN INTEREST", or their legal counsel if represented.

Joyce Howe, Office Manager
Unemployment Insurance Hearing Office
1801 Aberg Avenue, Suite A
Madison, Wisconsin 53707-7975

Date Mailed: Tuesday, August 22, 2000

Mailed By: Linda K. Esser

**STATE OF WISCONSIN
DEPARTMENT OF COMMERCE**

In the Matter of the PECFA Appeal of

Ray Price
GLS Industries
7200 N Hwy 63
Rochester MN 55906-8979

PECFA Claim # 53039-9607-58
Hearing #98-186

DELEGATION ORDER -- PECFA APPEAL

I, Brenda J. Blanchard, Secretary of the Department of Commerce, pursuant to §227.46(3)(a), Stats., do hereby delegate to the administrative law judge assigned to the above captioned appeal the authority to issue a final decision if a contested case hearing is not held because of withdrawal, default, settlement, untimeliness of the appeal, mootness of the appeal, lack of subject matter jurisdiction, or lack of standing to appeal. Pursuant to §227.46(3)(c), Stats., if a decision addressing the merits of the appeal is required or it is decided on any basis not delegated to the administrative law judge as described above, it shall be issued by the administrative law judge pursuant to the procedures in §227.46(2) as a proposed decision, and the Executive Assistant of the Department, Martha Kerner, shall make the final decision for the department.

Dated: February 9, 2000

Brenda J. Blanchard
Secretary
Department of Commerce

Copies to:

Ray Price
GLS Industries
7200 N Hwy 63
Rochester NIN 55906-8979

Kristiane Randal, Assistant Legal Counsel
Office of the Secretary
Department of Commerce
P O Box 7838
Madison WI 53707-7838

**State of Wisconsin
DEPARTMENT OF COMMERCE**

In the matter of-

The Claim for Reimbursement Pursuant
To the Provisions of the PECFA Program
By:
Ray Price
GLS Industries, Inc.
Appellant,

vs.

Hearing Number 98-186
PECFA CLAIM #53039-9607-58

Secretary,
Wisconsin Department of Commerce
Respondent

PROPOSED DECISION

Notice of Rights

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above matter. Any party aggrieved by the proposed decision must file written objections to findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI. 53707-7975. After the objection period, the hearing record will be provided to Martha Kerner, Executive Assistant to the Secretary of the Department of Commerce, who is the individual designated to make the FINAL Decision of the Department of Commerce in this matter.

STATE HEARING OFFICER:
RONALD I. WEISBROD

DATED AND MAILED:
May 19, 2000

MAILED TO:

Appellant Agent or Attorney

Ray Price
GLS Industries, Inc.
7200 N Hwy. 63
Rochester, MN 55906-8979

Department of Commerce

Kristiane Randal,
Assistant Legal Counsel
PO Box 7970
Madison, WI 53707-7970

ISSUE

On October 19, 1998, the Wisconsin Department of Commerce (department), which was responsible for administering the PECFA program, issued a letter advising the appellant that its claim for reimbursement of costs incurred following the removal of a petroleum underground storage tank, in the amount of \$8509.71, was denied. The issue to be determined is whether that determination was correct.

FINDINGS OF FACT

Since its formation in 1990, GLS Industries, (appellant), owned and operated a facility near Juneau, Wisconsin, where its predecessor, Great Lakes Silo, Inc, had manufactured cement farm storage silos. From that site the predecessor had dispatched silo erection crews. Located at the site were three underground petroleum storage tanks (USTs) that had been installed in about 1978 to fuel the construction vehicles. The appellant no longer built silos so it decided to remove the USTs.

On June 29, 1995 the tanks were removed. As required, a certified tank inspector was at the site to observe the tank removal. Soil samples were taken from several locations from the bottom of the excavation. Thereafter, a representative of the contractor that removed the tanks advised the appellant that the Wisconsin Department of Natural Resources (DNR) would have to be notified that the site was contaminated. The site assessment report completed by a representative of that contractor states that the tanks appeared to be in good condition with only minimal corrosion. That report did not state that there was a hole in any of the tanks or that the sides of any tank appeared stained.

After the tanks were removed, a laboratory analysis of the soil sample from under the diesel tank found that it contained an abnormal level of diesel range organics (DRO). After receiving the notice of contamination, the DNR directed the appellant to hire an environmental consulting firm to determine the source and extent of the contamination and to oversee the remediation of its site.

On September 19, 1995, the appellant's environmental consultant collected soil and water samples from the area where the tanks had been buried. After a laboratory analysis of the samples had been completed, the consultant reported finding only low levels of DRO. The consultant's report attributed the source of this low level of DRO to a statement from the appellant that there had been a spill of about one gallon of diesel fuel when the pipes to the diesel tank had been taken off at the time the tank was being removed.

Pursuant to a DNR directive, on August 7, 1996, the appellant's environmental consultant performed additional soil borings at the site. No contamination was detected. The consultant concluded that nothing further needed to be done at the site. Since the soils tested negative, the appellant was permitted to close the site without any remediation. Thereafter, the appellant submitted a claim for reimbursement of the costs incurred to investigate whether the site needed to be remediated.

APPLICABLE STATUTES

Wisconsin Stats. § 101.143(l)(cs) provides as follows:

"Occurrence" means a contiguous contaminated area resulting from one or more petroleum products discharges.

Wisconsin Stats. § 101.143(1)(e) provides as follows:

"Owner" means any of the following:

1. A person who owns, or has possession or control of, a petroleum product storage system, or who receives direct or indirect consideration from the operation of a system regardless of whether the system remains in operation and regardless of whether the person owns or receives consideration at the time environmental pollution occurs.
2. A subsidiary or parent corporation of the person specified under subd. 1.

Wisconsin Stats. § 101.143(3)(a)1, provides, in part, as follows:

(a) Who may submit a claim. Subject to pars. (ae), (ah), (am) and (ap), an owner or operator or a person owning a home oil tank system may submit a claim to the department for an award under sub. (4) to reimburse the owner or operator or the person for the eligible costs under sub. (4)(b) that the owner or operator or the person incurs because of a petroleum products discharge from a petroleum product storage system or home oil tank system if all of the following apply:

1. The owner or operator or the person is able to document that the source of a discharge is from a petroleum product storage system or home oil tank system.

Wisconsin Stats. § 101.143(4)(g) provides as follows:

Denial of claims, limits on awards. The department shall deny a claim under par. (a) if any of the following applies:

1. The claim is not within the scope of this section.
2. The claimant submits a fraudulent claim.
3. The claimant has been grossly negligent in the maintenance of the petroleum product storage system or home oil tank system.
4. The claimant intentionally damaged the petroleum product storage system or home oil tank system.
5. The claimant falsified storage records.
6. The claimant willfully failed to comply with laws or rules of this state concerning the storage of petroleum products.

7. The petroleum product discharge was caused by a person who provided services or products to the claimant or to a prior owner or operator of the petroleum product storage system or home oil tank system.

DISCUSSION

The appellant contended that the site investigation costs it incurred should be reimbursed by the department on the basis that because the inspectors who had been present when the tanks were removed did not report that any fuel was spilled during the removal process, that it must be concluded that there had been a compensible petroleum spill. The appellant's contention cannot be sustained.

The certified tank inspector, who was present at the site when the tanks were removed, did not have an independent recollection of the events that had occurred at the appellant's site. The appellant's site was one of the first tank inspections she had been present for. She recalled that two tanks had been removed. (Actually, there were three.) She claimed that her recollection of the events and condition of the tanks had been refreshed by viewing photographs that she had been told were of the appellant's tanks taken on June 29, 1995. She could not recall if any fuel had spilled when the diesel tank was removed. She stated that a worker with the environmental company had then entered the excavation and took a soil sample from the middle, and each end, of the excavation. She stated that she recalled observing stains on the side of one of the tanks being removed and claimed that she could smell petroleum in the soil. She also recalled that the soil around where the tank had been buried had been discolored. On the basis of her observations, she had concluded that there was a leak in the tank necessitating notice to the Department of Natural Resources. Neither her report nor any field notes contained a reference to there, being a hole in the tank.

The other witness presented by the appellant was at the site in question at the time the tanks were removed as an employee of the tank removal concern. He was the site assessor whose responsibility was to prepare a report regarding whether the site was contaminated. His report concluded the site was contaminated. Despite not having made any record that the tank had contained a hole, this witness recalled at the hearing that one of the tanks had been discolored and had a hole in it. He also recalled the soil being discolored from which he had concluded that the site was contaminated. However, this was one of his first inspections. He had inspected "hundreds of tanks" subsequent to that time. His claim that he could recall the details of this site because it was one of his first, is not adequate in light of his report made at the time that the tank was in good condition.

The photographs that the certified tank inspector claimed she had used to recall the events related to the removal of the tanks at the appellant's site were not presented as evidence at the hearing. The appellant was provided with an opportunity after the hearing to provide those photographs. The appellant did not provide that corroborative evidence.

CONCLUSIONS OF LAW

The State Hearing Officer therefore finds that the appellant has failed to establish that its site was contaminated by a petroleum discharge, within the meaning of Wis. Stat. Ch. 101 and Wis. Admin Code DOC Ch. 47.

DECISION

The department's decision, dated June 25, 1998, denying reimbursement because any petroleum contamination of the appellant's site was attributed to a cause not covered by the law, is affirmed.

STATE HEARING OFFICER

By

Ronald L. Weisbrod
Administrative Law Judge

98-186/riw